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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE DISTRICT OF OREGON
9 PORTLAND DIVISION
10

11 **GEORGE KANGES,**

12 Plaintiff,

Case No. CV 08-117-HU

13 v.

14 **MICHAEL J. ASTRUE**, Commissioner
15 of Social Security,

16 Defendant.

**FINDINGS AND
RECOMMENDATION**

17 Tim Wilborn
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Attorney for plaintiff

19 Dwight Holton
20 Acting United States Attorney
District of Oregon
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21 Assistant United States Attorney
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Attorneys for defendant

23 HUBEL, Magistrate Judge:
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25 The matter before the court is plaintiff's motion for
26 attorney's fees pursuant to 42 U.S.C. § 406(b) (doc. # 30). The fee
27 requested is \$16,353.50, which counsel represents to be "about

28 Findings and Recommendation Page 1

1 24.12%" of the amount awarded as retroactive benefits.¹ Plaintiff's
2 motion is not opposed.

3 **Procedural Background**

4 Claimant George Kanges brought this action on January 28,
5 2008, to challenge a ruling by the Commissioner finding Mr. Kanges
6 disabled as of October 5, 2004, but not before. Because Mr.
7 Kanges's insured status for purposes of disability benefits (DI)
8 expired on June 30, 2004, the Commissioner's Administrative Law
9 Judge (ALJ) approved only Mr. Kanges's application for Supplemental
10 Security Income (SSI) benefits, which are not dependent upon the
11 date last insured.

12 In his opening brief, filed on December 5, 2008, Mr. Kanges
13 asserted that the ALJ's selection of October 5, 2004 as his onset
14 date was arbitrary, because the record showed progressive
15 impairments that made it difficult to establish through medical
16 evidence the precise date the impairment became disabling. Mr.
17 Kanges argued that the ALJ should either have considered his own
18 allegations, work history, and medical or other evidence, using the
19 date alleged by him if it were consistent with all the evidence
20 available or, if the evidence were ambiguous, calling upon the
21 services of a medical expert to determine the proper onset date.

22 The parties filed a stipulated motion to remand for further
23 administrative proceedings on February 10, 2009. The stipulation
24 provided that the ALJ would 1) for the period prior to October 5,

26 ¹Under 42 U.S.C. § 406(b), the court may award a reasonable
27 fee no more than 25% of the claimant's retroactive award.

1 2004, obtain evidence from a medical expert to clarify the onset
 2 date; 2) further evaluate Mr. Kanges's residual functional capacity
 3 prior to his date last insured; and 3) if warranted by the expanded
 4 record, obtain supplemental vocational expert testimony, and
 5 determine whether Mr. Kanges was capable of performing any other
 6 work existing in the national economy considering his age,
 7 educational, vocational history and residual functional capacity.

8 **Fee request**

9 The contingent fee agreement between Mr. Kanges and his
 10 counsel provides for attorney's fees in the amount of 25% of the
 11 retroactive benefits or the amount awarded under the Equal Access
 12 to Justice Act, 28 U.S.C. § 2412(d) (EAJA), whichever is greater.
 13 Plaintiff's Memorandum, Exhibit 1. Mr. Kanges has been awarded fees
 14 under the EAJA in the amount of \$5,400.² (Doc. # 29) Counsel filed
 15 with his EAJA application time sheets showing 31.4 hours expended
 16 on the case (doc. # 26). The fee requested here represents an
 17 hourly rate of \$520.81.

18 **Standards**

19 In evaluating a request for fees under § 406(b), the court
 20 must look to the fee agreement, then test its reasonableness.
 21 Crawford v. Astrue, 586 F.3d 1142, 1149 (9th Cir. 2009) (en banc),
 22 citing Gisbrecht v. Barnhart, 535 U.S. 789, 808 (2002). A 25% fee
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24 ²Attorney fees in Social Security cases may be awarded under
 25 both EAJA and § 406(b), but the EAJA award offsets the award
 26 under § 406(b). Gisbrecht, 535 U.S. at 796. EAJA fees are
 27 determined by multiplying an hourly rate, capped by statute at
 \$125.00, by the number of hours spent. Id.; 28 U.S.C. §
 2412(d) (2) (A).

1 is not automatic: "the statute does not create any presumption in
2 favor of the agreed upon amount." Gisbrecht, 535 U.S. at 807 n. 17.
3 Because the Social Security Administration has no direct interest
4 in how much of the award goes to counsel and how much to the
5 claimant, the district court has an affirmative duty to address the
6 question of whether the contingent fee should be reduced. Crawford,
7 586 F.3d at 1149. See also Gisbrecht, 535 U.S. at 807 (court must
8 review contingent fee arrangements "to assure that they yield
9 reasonable results in particular cases.") The factors to be weighed
10 when considering a reduction include the character of the
11 representation, the results the representative achieved, any delay
12 attributable to the attorney seeking the fee, and whether the
13 benefits obtained were "not in proportion to the time spent on the
14 case." Id. at 808; Crawford, 586 F.3d at 1149.

15 Counsel here undertakes to establish that his fee is
16 reasonable by referring to the *Oregon State Bar 2007 Economic*
17 *Survey*, (Survey) used by judges in this court as a benchmark for
18 determining reasonable hourly rates for attorney fee awards. The
19 Survey reports that attorneys practicing in "other areas" in
20 Portland average \$242 per hour. Id. at 31. Counsel argues for an
21 upward adjustment of this benchmark rate, based on the risks of
22 representing claimants in Social Security cases. Counsel asserts
23 that Social Security lawyers have only a 33.52% chance of winning
24 benefits for the claimant, so that an upward adjustment of 2.98
25 (100/33.52) is warranted. Counsel asserts that the Survey also
26 establishes that Portland attorneys spend 15% of their time on
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1 contingency matters, but derive 17% of their income from such
2 cases. Thus, typical Oregon attorneys who take cases on a
3 contingent fee basis "more than make up for their contingency
4 losses, by a factor of 17/15ths." Memorandum, p. 4. This, he
5 contends, justifies an additional multiplier of 17/15 ($\$244 \times$
6 $2.98 \times 17/15 = \$824.07$). On the basis of these calculations, counsel
7 concludes that \$824.07 an hour, averaged across all cases in which
8 fees are awarded under § 406(b), would properly compensate
9 claimants' attorneys for the risk of non-payment due to
10 contingency, and place them on an equal footing with the average
11 attorney in the Portland area who takes contingency fee cases.

12 In addition, counsel notes that the EAJA fee award will offset
13 the fee requested here, with the smaller award being returned to
14 the claimant, so that the total out of pocket cost to Mr. Kanges
15 will be only \$10,953.50, a "very reasonable fee for the claimant to
16 pay, inasmuch as the undersigned efforts won for the claimant at
17 least \$67,814.00 in retroactive benefits, plus ongoing benefits."
18 Memorandum, p. 6.

19 Counsel's arguments do little to assist the court in
20 determining the reasonableness of the fee requested. Counsel's
21 analysis is based on a lodestar approach, constructing a proposed
22 reasonable hourly rate and then arguing for upward adjustments of
23 that rate. This is contrary to the instruction of Gisbrecht and
24 Crawford, which is to begin with the fee agreement and then test it
25 for reasonableness by applying the factors identified by these
26 cases for determining whether a reduction is appropriate.

1 Further, counsel's analysis fails to comply with the Crawford
2 court's direction that the risk to be considered is that of the
3 "specific case at issue" and not the lawyer's "overall success
4 rate." Similarly, consideration of the success rate of social
5 security appeals in general is inappropriate.

6 I now consider the factors articulated in Gisbrecht and
7 Crawford. Counsel has not carried his burden of demonstrating the
8 reasonableness of the fee sought for the services rendered in this
9 case, as required by Gisbrecht, 535 U.S. at 807.

10 Reduction of a contingency fee is appropriate if the character
11 of the representation is substandard. Gisbrecht, 535 U.S. at 808.
12 Counsel's representation of the claimant in this case was not
13 substandard, so no downward adjustment is required.

14 With respect to the results achieved, counsel represents that
15 the fee sought is "about 24.12% of the retroactive benefits," and
16 that Mr. Kanges received "at least \$67,814.00 in retroactive
17 benefits," but does not provide the court with an exact figure of
18 the benefits obtained. Gisbrecht instructs that a fee reduction is
19 appropriate if "the benefits are large in comparison to the amount
20 of time the attorney spent on the case." 535 U.S. at 807. As
21 discussed below, the time spent is mid range of a typical case
22 involving opposition by the government which was not present here.

23 A fee is unreasonable and subject to reduction by the court if
24 the attorney engaged in dilatory conduct in order to increase the
25 accrued amount of past-due benefits. Gisbrecht 535 U.S. at 808;
26 Crawford, 586 F.3d at 1148. I find no indication that counsel was
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1 responsible for any delay, so no downward adjustment on that basis
2 is warranted.

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4 I turn now to the question of whether the benefits obtained
5 were in proportion to the time spent on the case. According to
6 counsel's time records, he and another attorney in California,
7 Victoria Chhagan, spent a total of 31.4 hours on the case. Although
8 the administrative record in this case was over 1,000 pages long,
9 making the arguments in favor of an earlier onset date did not
10 require counsel to engage in an extensive review of the record. The
11 opening brief summarizes 18 months of medical records supporting
12 the earlier onset date in half a page, and summarizes six months of
13 mental health records in two pages.

14 Counsel's time records show that 21 hours were spent on the
15 opening brief, which was 18 pages long. Approximately one and a
16 half pages of the brief is boilerplate on the familiar standard of
17 review and the sequential analysis. The Commissioner conceded that
18 the ALJ's onset date was not supported by the record. Thus, a
19 positive result was achieved with relatively little effort.

20 In Harden v. Commissioner, 497 F. Supp.2d 1214, 1215 (D. Or.
21 2007), Judge Mosman observed that "[t]here is some consensus among
22 the district courts that 20-40 hours is a reasonable amount of time
23 to spend on a Social Security case that does not present particular
24 difficulty." (citing cases). Judge Mosman held that absent unusual
25 circumstances or complexity, "this range provides an accurate
26 framework for measuring whether the amount of time counsel spent is

1 reasonable." Id. at 1216. See also Gill v. Commissioner, CV 07-812-
2 HU (D. Or. December 10, 2008). Although the brief is certainly
3 adequate, it presents nothing of unusual difficulty by way of facts
4 or law. Because the Commissioner conceded a remand after Mr. Kanges
5 filed his opening brief, plaintiff avoided the time and expense of
6 reviewing a government response brief and preparing a reply. As a
7 result, a reasonable amount of time to have spent on this case
8 would be at or below the low end of the 20-40 hour range. I
9 conclude, therefore, that the manner in which counsel achieved the
10 favorable result for Mr. Kanges does not support a fee which
11 represents an hourly rate of \$520.81.

12 The risk assumed by counsel in accepting this case, that no
13 benefits would be awarded, was minimal. See Crawford, 586 F.3d at
14 1152. Mr. Kanges had already obtained benefits; only the alleged
15 onset date was in dispute. The fact that the Commissioner conceded
16 as soon as the opening brief was filed indicates that success was
17 not much in doubt. The parties stipulated to the remand and to the
18 specific tasks to be performed by the ALJ on remand. This factor
19 warrants a reduction in the fee request.

20 Applying the Gisbrecht and Crawford factors, I conclude that
21 reduction is appropriate for counsel's failure to meet his burden
22 of demonstrating the reasonableness of the fee request for this
23 particular case; the significant amount of time spent on a case
24 that was simple and limited in scope; the modest effort required to
25 yield a positive result; and the absence of any significant risk
26 of nonpayment. I therefore recommend that the fee request be
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1 reduced to 50% of the total requested, or \$8,176.75, an hourly rate
2 of \$260.41 for the 31.4 hours worked on the case.

3 **Conclusion**

4 I recommend that plaintiff's motion for attorney's fees
5 pursuant to 42 U.S.C. § 406(b) (doc. # 30) be GRANTED in part, and
6 that a fee of \$8,176.75 be awarded.

7 **Scheduling Order**

8 These Findings and Recommendation will be referred to a
9 district judge. Objections, if any, are due December 13, 2010. If
10 no objections are filed, then the Findings and Recommendation will
11 go under advisement on that date. If objections are filed, then a
12 response is due December 30, 2010. When the response is due or
13 filed, whichever date is earlier, the Findings and Recommendation
14 will go under advisement.

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16 Dated this 23rd day of November, 2010.

17 /s/ Dennis J. Hubel

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19 Dennis James Hubel
20 United States Magistrate Judge
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